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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. .....

J. W. NORVELL, Warden,

Petitioner,

v.

J. W. JONES, PURSIE GIBSON &
NOBEL MOODY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, J. W. Norvell, Warden, Fort Pillow State Prison Farm, respectfully prays a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding January 5, 1973 overruling the District Court's denial of a writ of habeas corpus for three State prisoners.

OPINIONS BELOW

The opinion of the Sixth Circuit, ... F.2d ..., not yet reported, is reproduced as Appendix A. The order of the United States District Court for the Western District of Tennessee is not reported and is reproduced as Appendix B. The opinion of the Tennessee Court of Criminal Appeals, filed August 20, 1971 is not reported and is reproduced as Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered January 5, 1973. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a U. S. District Court, in exercise of its habeas corpus jurisdiction, may void a State criminal conviction on the grounds that an *Allen*-type instruction was given to a jury known to be deadlocked eleven to one.

STATUTORY AND RULE PROVISIONS INVOLVED

United States Constitution Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ...."

United States Constitution Amendment XIV, §1:

" * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 2241:

(a) "Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the district courts and circuit judge within the respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of was had.

* * *

(c) The writ of habeas corpus will not extend to a prisoner unless ——

* * *

(3) He is in custody in violation of the constitution or laws or treaties of the United States;"

28 U.S.C. 2254:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

The three respondents were convicted of robbery in the Criminal Court of Henderson County, Tennessee and sentenced to serve five years in the Tennessee State Penitentiary. Their conviction was unanimously affirmed by

the Tennessee Court of Criminal Appeals in its opinion of August 20, 1971 [Appendix C]. The Tennessee Supreme Court denied certiorari on January 18, 1972 without opinion. Among the errors assigned was the propriety of two mild versions of the *Allen* charge given to a jury deadlocked eleven to one. After this unfavorable decision, the respondents petitioned for the writ of habeas corpus in the United States District Court for the Western District of Tennessee. Their petition was dismissed by the United States District Judge, the Honorable Harry W. Wellford, on the ground that the contested jury instructions were not improper. The case was argued in the Sixth Circuit before Judges Edwards, McCree and Cecil. The decision of the District Court was reversed and the case remanded for entry of the writ of habeas corpus, unless the State saw fit to retry the appellants within a reasonable time.

In its per curiam opinion, the Court of Appeals held that the facts of this case "constitute a totality of circumstances which violate the constitutional rights of appellants to a fair and impartial jury trial under the Sixth and Fourteenth Amendments." The Court stated that the identification of a deadlocked jury's majority—minority count plus the coercive jury charge constituted a totality of circumstances amounting to a denial of a constitutional right. The challenged instructions are set forth in Appendix D.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT IS UNPRECEDENTED AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE COURTS.

The present case breaks new ground. Despite much criticism of the *Allen* charge, and its abolishment in several U. S. circuits, no court has held that the charge is so coercive as to amount to a denial of a ***constitutional*** right. *Shaw v. Robbins*, 338 F. Supp. 756, 758-759 (D. Maine 1972). Each of the circuits which has abolished or revised the *Allen* charge has done so in the exercise of its inherent supervisory powers. For example, of the thirteen decisions cited by the Fifth Circuit in its review of the positions of the eleven U. S. Circuit Courts of Appeal in its highly critical (but affirming) decision in *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972), ***none*** involved a federal court exercising its habeas corpus power to review state criminal convictions; and ***none*** held that use of the *Allen* charge was an infringement of a ***constitutional*** right. See *id*, at 667-668.

This case has significance beyond the interests of the immediate parties. Many state and federal convictions may be collaterally attacked and voided in reliance on it.

II. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH OTHER COURTS OF APPEAL.

In addition to the fact that no court has held the use of the *Allen* charge violates a constitutional right, the circuits are divided over the limits of the proper use of such a charge in exercise of their supervisory authority over the lower federal courts.

The First Circuit: The First Circuit, despite its recognition of the criticisms and abandonment of the *Allen* charge in other circuits, noted the value of the *Allen* charge, "refuse[d] to restrict [its] trial judges" and reaffirmed the use of an *Allen*-type instruction in future cases. *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971).

The Second Circuit: The Second Circuit has approved the *Allen* charge. *United States v. Hynes*, 424 F.2d 754 (2nd Cir. 1970), cert. denied 399 U.S. 933 (1970). It is also the position of this circuit that where the charge is tempered, as here, by the inclusion of the statement that the juror is not expected to abandon his conscientious conviction, it is *a fortiori* non-coercive. See *United States v. Kahaner*, 317 F.2d 459, 484 (2nd Cir. 1963), cert. denied, 375 U.S. 835; *United States v. Curcio*, 279 F.2d 681 (2nd Cir. 1970), cert. denied 364 U.S. 824; *United States v. Thomas*, 282 F.2d 191 (2nd Cir. 1960). The Court in *United States v. Martinez*, 446 F.2d 118 (2nd Cir. 1971) cert. denied, 404 U.S. 944 again affirmed the use of the *Allen* charge.

The Third Circuit: The Third Circuit has rejected the *Allen* charge in favor of the language from *Federal Jury Practice and Instructions*, Mathes & Devitt, 1965 §75.01. *United States v. Fiorvanti*, 412 F.2d 407 (3rd Cir. 1969) cert. denied 396 U.S. 837.* It should be noted that the convictions in this case were not reversed.

---

* The Court's rationale is set forth at 412 F.2d 418: "In addition to the unsettling effect which a strategically inserted **Allen** charge might have on the **constitutional requirement of unanimity**, its effect on the necessity for proof beyond a reasonable doubt makes it doubly circumspect." (Emphasis added). Neither of these arguments has any validity after **Louisiana v. Johnson**, 406 U.S. 356 (1972) and **Apodaca v. Oregon**, 406 U. S. 404 (1972).

The Fourth Circuit: In *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970) and in *United States v. Williams*, ... F.2d ... (4th Cir. No. 71-2120, filed July 3, 1972), the Fourth Circuit affirmed the use of the *Allen*-type charge in a deadlocked situation.

The Fifth Circuit: Although the Fifth Circuit has recently roundly criticized the use of an *Allen*-type charge, it has refused to overturn a conviction of this basis and has never held that use of an *Allen* charge constituted an abridgement of a constitutional right. See e.g., *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972) *rehearing en banc pending*; *United States v. Sutherland*, 463 F.2d 641 (5th Cir. 1972); *United States v. Bredy*, 455 F.2d 1382 n.1. (5th Cir. 1972); *United States v. Roberts*, 455 F.2d 930, 932 (5th Cir. 1972); *United States v. George*, 450 F.2d 269, 270 (5th Cir. 1971); *United States v. Williams*, 440 F.2d 894, 898, 900 (5th Cir. 1971).

The Sixth Circuit: To our knowledge, this is the first *Allen*-type charge appeal in the Sixth Circuit during the last two and a half years. The Sixth Circuit has been quick to criticize any unauthorized embellishments of the *Allen* charge itself. See *e.g.*, *United States v. Harris*, 291 F.2d 348, 355 (6th Cir. 1968); *United States v. Smith*, 399 F.2d 896, 899 (1968); *United States v. Barnhill*, 305 F.2d 164 (1962) cert. denied 371 U.S. 865; *Israel v. United States*, 3 F.2d 743, 745-746 (6th Cir. 1925). Until the present case, there has been no suggestion by the Sixth Circuit that use of the *Allen* charge constituted an abridgement of a constitutional right.

The Seventh Circuit: The Seventh Circuit has advised its trial courts under its supervisory authority not to use the *Allen* charge. The Court stated that instead, district courts should comply with the standards suggested by the

American Bar Association. *Brown v. United States*, 411 F.2d 930 (7th Cir. 1969), cert. denied 396 U.S. 1017. The Court did not reverse the conviction in this decision, however, and there are no Seventh Circuit cases which suggest that use of the *Allen* charge represents the abridgement of a constitutional right.

The Eighth Circuit: The Eighth Circuit position was stated in *Hodges v. United States*, 408 F.2d 543, 552 (8th Cir. 1969) (Blackmun, J.) in which a slightly embellished *Allen* charge was given: " * * * The Supreme Court has not yet seen fit to disavow it. So long as it stands approved in decided Supreme Court cases, we are not to resolve that issue contrarily." See also *Pope v. United States*, 415 F.2d 685 (8th Cir. 1969), cert. denied 397 U.S. 950; *United States v. Robinson*, 419 F.2d 1109, 1112 (8th Cir. 1969). Although the *Allen* charge was discussed and criticized in these cases, there were no reversals on this basis, and no intimation that use of the *Allen* charge presented a constitutional question.

The Ninth Circuit: The Ninth Circuit has approved the delivery of supplemental charges similar to those given in this case. See *United States v. Moore*, 429 F.2d 1305, 1306 (9th Cir. 1971); *Dearinger v. United States*, 378 F.2d 346, 347-348 n.2 (9th Cir. 1967) cert. denied 389 U.S. 885.

The Tenth Circuit: In *United States v. Seasholtz*, 435 F.2d 4, 7 n.4 (10th Cir. 1970) the Court approved a mild *Allen* instruction. Earlier the Court had approved the use of ABA standards. See *United States v. Wynn*, 415 F.2d 135 (10th Cir. 1969); see also *United States v. Winn*, 411 F.2d 415 (10th Cir. 1969). None of these cases involved a reversal on the basis of the improper instructions. The Court has concluded that there is no

ritual of words which must be followed and has taken an *ad hoc* approach to the problem: "The question is whether the language used was coercive, not whether the Judge used the magic words." at 417. See also *Munroe v. United States*, 424 F.2d 243 (10th Cir. 1970); *United States v. Seasholtz*, *supra*; *United States v. Calley*, 452 F.2d 243, 249 (10th Cir. 1971).

The District of Columbia Circuit: The District of Columbia Circuit's 5-4 decision barring the use of the *Allen* charge was predicated "on the needs of judicial administration." *United States v. Thomas*, 449 F.2d 1177 at 1177 at 1187 (D.C. Cir. 1971) (*en banc*). However, the Court placed heavy emphasis in its opinion on the unanimous jury requirement in federal cases; saying:

> "Every defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of the jury of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude. When efforts to secure a verdict from the jury reach a point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted." (Id at 1181.)

Your petitioner submits this logic cannot be applied to the States after *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), where it was held that unanimity is not required in state jury verdicts.

III. THE SIXTH CIRCUIT OPINION IN THIS CASE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND SETTLED CASE LAW.

A. Authorities from this Court.

Authorities from this Court include the leading case of *Allen v. United States*, 164 U.S. 492 (1896) which contains the charge to which the present jury instructions were fairly compared by the Sixth Circuit. Similar charges were approved in *Lias v. United States*, 284 U.S. 584 (1931) and *Kawahita v. United States*, 343 U.S. 717. This Court's decisions in *Johnson v. Louisiana*, 406 U.S. 356 (1972) (approving 9 to 3 verdicts) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) seem to foreclose any finding that the jury instructions in this case or the identification of a deadlocked jury's majority-minority count presents a constitutional question. The *Allen* charge is mentioned with apparent approval in *Johnson v. Louisiana*, *supra*, 406 U.S. at 362.

Although the court's inquiry into the numerical division of a deliberating jury was criticized in *Burton v. United States*, 196 U.S. 283 (1904), and, when combined with an *Allen* charge, constituted grounds for reversal in *Brasfield v. United States*, 272 U.S. 448 (1926), it has been held there are often situations when such an inquiry is permissible. The *Brasfield* rule is not inflexible. There are situations when the inquiry is harmless error. See *United States v. Meyers*, 410 F.2d 692 (2nd Cir. 1969), *Beale v. United States*, 263 F.2d 215 (5th Cir. 1959); *Butler v. United States*, 254 F.2d 875 (5th Cir. 1958); *Bowen v. United States*, 153 F.2d 747 (8th Cir. 1946). Compare *United States v. Rogers*, 289 F.2d 433, 435-436 (4th Cir. 1965) where it was held that an inquiry about the numerical division of a deadlocked jury was "a trifling addition to the impact of the *Allen* charge."

B. Other Authorities.

In only six states, to our knowledge—Arizona, Pennsylvania, Alaska, Illinois, Maine, and Montana—have

instructions patterned substantially after the *Allen* charge been disapproved. *State v. Thomas*, 86 Ariz. 161 (1959), *Commonwealth v. Spencer*, 42 Pa. 325 (1971); *Fields v. State*, 487 P.2d 831 (Alas. 1971); *People v. Mills*, ... Ill. App.2d ... (3rd Dist. Ct. App. 1971); *State v. Randall*, 137 Mont. 534, 540-542 (1970). *State v. White*, 285 A.2d 832 (Me. 1971).

Twenty-nine states have approved the use of *Allen*-type instructions substantially like that in the present case. See *e.g.*, *Bufkins v. State*, 20 Ala. App. 457, 460-461 (1924); *McGaha v. State*, 216 Ark. 165, 172 (1949); *People v. Baumgartner*, 166 Cal. App. 2d 103, 105-108 (1958); *Sevilla v. People*, 65 Colo. 437, 441-442 (1918), *reaffirmed in Mills v. People*, 146 Colo. 457, 462-463 (1961), certiorari denied, 369 U.S. 841; *State v. Walters*, 145 Conn. 60, 62-64 (1958), *appeal dismissed*, 358 U.S. 46; *State v. Maclary*, 193 A. 2d 195 (Del. 1963); *Yancy v. State*, 173 Ga. 685, 689-692 (1931); *State v. Tope*, 86 Idaho 462, 468-469 (1963); *State v. Bogardus*, 188 Iowa 1293, 1298-1301 (1920); *Abbott v. Commonwealth*, 352 S.W.2d 552, 554 (Ky. 1961); *State v. Dudoussat*, 47 La. Ann. 977, 998-999 (1895); *State v. Pike*, 65 Me. 111, 116 (1876); *Commonwealth v. Tuey*, 8 Cush. (62 Mass.) 1, 2-4 (1851), *reaffirmed in Highland Foundry Co. v. New York, New Haven, and Hartford R.R. Co.*, 199 Mass. 403, 407 (1908), and *Commonwealth v. Hassan*, 235 Mass. 26, 33 (1920); *People v. Chivas*, 322 Mich. 384, 392-395 (1948); *State v. Doan*, 225 Minn. 193, 202-206 (1947); *State v. Bozarth*, 361 S.W.2d 819, 826 (Mo. 1962); *State v. Williams*, 39 N.J. 471, 481-485 (1963), certiorari denied, 374 U.S. 855; *Territory v. Donahue*, 16 N.M. 17, 26-28 (1911), *reaffirmed in State v. Horton*, 57 N.M. 257, 261-262 (1953); *State v. Pugh*, 183 N.C. 800, 802 (1922); *Montgomery v. State*, 19 Okla. Cr. 224,

227-229 (1921); *State v. Butler*, 96 Ore. 219, 237-242 (1919); *State v. Scott*, 123 Atl. 292 (R.I. 1924); *State v. Pulley*, 216 S.C. 552, 555-557 (1950); *State v. Egland*, 23 S.D. 323, 326-328 (1909); *Simmons v. State*, 198 Tenn. 587, 594-596 (1955); *Rippetoe v. State*, 67 Tex. Cr. 192, 196-197 (1912); *State v. Gorham*, 67 Vt. 365, 371-372 (1894); *State v. Thomas*, 63 Wash. 2d 59, 65-67 (1963); *Boyd v. State*, 217 Wis. 149, 158-159 (1935); *Nicholson v. State*, 24 Wyo. 347, 356-358 (1916). Cf. *People v. Faber*, 199 N.Y. 256, 260-261 (1910) (*dictum*).

CONCLUSION

The Sixth Circuit decision in this case not only conflicts with other Courts of Appeal, but breaks new ground in the direction of further supervision of state criminal proceedings by federal courts in an area which had previously been thought to present no constitutional questions. In addition, this case presents a good opportunity for the Court to consider and resolve the constantly recurring problem of *Allen*-type charges—an area where the state of the law is unusually clouded and about which the circuits disagree.

Respectfully submitted,

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APPENDIX A

No. 72-1469

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

J. W. JONES, PURSIE GIBSON, and NOBEL MOODY,
Plaintiffs-Appellants,
v.
J. W. NORVELL, Warden,
Defendant-Appellee.

NO. 72-1469

Decided and Filed January 5, 1973.

Before: Edwards and McCree, Circuit Judges, and Cecil, Senior Circuit Judge.

PER CURIAM. This is an appeal from a decision of the United States District Court for the Western District of Tennessee denying a petition for writ of habeas corpus without an evidentiary hearing.

On Appeal the only issue of substance pertains to appellants' claims that their Fourteenth Amendment rights were violated when the trial court judge at their state

court trial gave a version of the "Allen" charge to a deadlocked jury. *See Allen v. United States*, 164 U.S. 492 (1896). On review of the state court trial proceedings, it appears clear to this court that the trial judge was informed by a court officer not only that the jury was deadlocked, but that the jury stood 11 to 1. He then recited that division to the jury and asked whether the court officer's report of 11 to 1 was correct. On receiving a conditional affirmative, the trial judge said: "[I]t is your duty to reach a verdict if you can possibly do so—you 12 people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones." Subsequently he ascertained that the jury majority was in favor of a guilty verdict and sent them back out to "see if you can make any progress. As I told you, it is your duty to decide this case, if you can do so." Thereupon within five minutes the jury returned with a verdict finding all three defendants guilty and fixing the punishment at five years in the state penitentiary.

The court believes that the facts recited above involved the invasion of jury secrecy (*See Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965)), the identification of a deadlocked jury's majority-minority count (*See Brasfield v. United States*, 272 U.S. 448, 450 (1926)), a coercive jury charge (*See e.g., Jenkins v. United States*, 380 U.S. 445, 446 (1965)) and the speedy return of a verdict subsequent to the charge (*See e.g. United States v. Rogers*, 289 F.2d 433, 436-37 (4th Cir. 1961)). These facts constitute a totality of circumstances which violate the constitutional rights of appellants to a fair and impartial jury trial under the Sixth and Fourteenth Amendments.

The decision of the District Court is reversed and the case is remanded for entry of the writs prayed for, unless the state sees fit to retry the appellants within a reasonable time.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

J. W. JONES, PURSIE GIBSON and NOBEL MOODY,

Petitioners,

vs.

J. W. NORVELL, Warden,

Respondent.

NO. 2140

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed March 21, 1972)

In this cause petitioners, J. W. Jones, Pursie Gibson and Nobel Moody, have filed a Petition for Rehearing following the Court's denial of their Petition for Writ of Habeas Corpus for failure to exhaust state remedies. Petitioners allege that their convictions for robbery in the Criminal Court of Henderson County, Tennessee, were unconstitutional in that: (1) the evidence clearly preponderates against the verdict of the jury and in favor of the innocence of petitioners; and (2) the trial court erred in its use of the "Allen" charge. For the reasons set out hereinafter the Court finds that the petition should be dismissed.

Appendix B

I. Sufficiency of the Evidence.

Federal habeas corpus does not serve as an additional appeal from State court conviction. *Fay v. Noia*, 372 U.S. 391 (1963). "Sufficiency of evidence to support a state conviction raises no Federal constitutional question, and cannot be considered in Federal habeas proceedings by state prisoners." *Sinclair v. Turner*, 447 F.2d 1158, 1161 (10th Cir. 1971); *Young v. Alabama*, 443 F.2d 854 (5th Cir. 1971); *Freeman v. Stone*, 444 F.2d 113 (9th Cir. 1971); *Ballard v. Howard*, 403 F.2d 653 (6th Cir. 1968); *Phillips v. Tollett*, 330 F. Supp. 776 (E.D. Tenn. 1971). A state prisoner is entitled to relief in Federal courts only when rights guaranteed by the United States Constitution have been denied. *Sinclair v. Turner*, *supra*; *Opie v. Meacham*, 419 F.2d 465 (10th Cir. 1969), cert. denied, 399 U.S. 927 (1970). To raise a constitutional question, evidence of guilt must be totally devoid of value; the test is not whether the verdict was against the weight of evidence but whether there was any evidence to support it. *Mathis v. Colorado*, 425 F.2d 1165 (10th Cir. 1970); *Holloway v. Cox*, 437 F.2d 412 (4th Cir. 1971); *McGhee v. Sigler*, 328 F. Supp. 538 (D.C. Neb. 1971); *U. S. v. Yeager*, 330 F. Supp. 802 (D.C. N.J. 1971).

An examination of the record indicates that there was evidence at the trial, which if believed by the jury, would support the petitioners' conviction.

II. Use of the "Allen" charge.

At the petitioners' trial the Court instructed the jury in pertinent part as follows:

> "I would like to tell you this: While the verdict must be the verdict of each individual juror, and not just a

mere acquisence in the conclusion of your fellow jurors, yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It would be an unusual thing for all 12 of you to go to the jury room thinking exactly alike when you go in there. That is one reason we discuss this matter, because some juror may think of something that someone else has overlooked, and others may think of something you have overlooked.

It is your duty to decide this case if you can conscientiously do so. You should listen with a disposition to be convinced to each other's arguments. If a larger number are—if the larger number are for conviction or acquittal, a dissenting juror should consider whether his or her doubt is a reasonable one, which made no impression on the minds of so many other jurors, equally honest and equally intelligent with himself.

The jury, of course, should not go contrary to their convictions, but they should properly give heed to the opinions of their fellow jurors, and by reasonable concessions reach a conclusion, which although not originally entertained by them, nevertheless may be one to which all can scrupulously adhere.

In other words, the minority should listen to the views of the majority with a disposition to be convinced. However, no one is expected to sacrifice their honest convictions solely for the sake of reaching an agreement."

Appendix B

The above quoted charge is commonly referred to as the "Allen" charge.[1] As ably pointed out by respondent in his answer to the petition, even though the Allen charge has been the subject of much criticism in recent years, charges similar to the above have been approved by the Sixth Circuit Court of Appeals. [*See e.g.*, *Israel v. U. S.*, 3 F.2d 743 (6th Cir. 1925) and *U. S. v. Barnhill*, 305 F.2d 164 (6th Cir.); *cert. denied*, 371 U.S. 865 (1962)], and the State of Tennessee [*see*, *e.g.*, *Simmons v. State*, 198 Tenn. 587, 281 S.W.2d 487 (1955) and *High v. Lenow*, 195 Tenn. 158, 258 S.W.2d 742 (1953)].

The Tennessee Court of Appeals engaged in a complete analysis of the use of the Allen charge in the petitioners' trial and found no error in the application. Upon consideration of the record the Court does not find that the trial court's use of the charge was coercive or prejudicial. Nor does the Court find that petitioners have been denied due process of law or any other constitutional rights in their state prosecutions. This Court does not feel the language used abrogated the duty of each juror to decide the case for himself.

On the basis of the foregoing, it is Ordered that the Petition for Writ of Habeas Corpus be and the same hereby is denied.

/s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

Date: 3-21-72

---

[1] The charge originated in the case of **Allen v. U. S.**, 164 U.S. 492 (1896).

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE JACKSON, MARCH SESSION, 1971

NOBLE MOODY, PURSIE GIBSON AND J. W. JONES, JR.,
Plaintiffs in Error

V.

STATE OF TENNESSEE,
Defendant in Error

Henderson County Criminal

(Filed August 20, 1971)

For the Plaintiffs in Error:

Bill R. Martin
Lexington, Tennessee

For the Defendant in Error:

David M. Pack
Attorney General of Tennessee

Robert H. Roberts
Assistant Attorney General

David P. Murray
District Attorney General

OPINION FILED: Aug. 20, 1971

AFFIRMED
William S. Russell, Judge

Appendix C

The three plaintiffs-in-error stand convicted of the robbery of one Jerry Whittaker of the sum of three to five dollars and a wrist watch. The punishment was set at five years in the penitentiary for each.

Whittaker had spent a good part of the day in question drinking at a beer tavern, became involved in a fight, was asked to leave, and was walking along the highway toward his home when Jones, Gibson and Moody came along in an automobile. He thumbed them down. He says that he was thereafter the victim of strong-arm robbery to the extent of all of the money that he had plus his wrist watch.

All of the facts and circumstances do not lend credence to Whittaker's story, as we read the record. However, he testified to a state of facts making out the robbery, the jury and trial judge saw and heard and believed him, and there was no contrary proof. The evidence would appear to be legally sufficient to support the verdict and judgment.

The remaining questions presented by this record are rooted in the following part of the transcript of the trial:

"Thereupon, the jury retired at 1:45 o'clock P.M. to deliberate, and at 3:50 o'clock P.M. the Court recalled the Jury, and the following transpired:

THE COURT: A few minutes ago I sent one of the officers to check with you to see if you were making any progress, and I believe he came back with the report that you stood 11 to one. I don't know whether that's 11 for conviction, or 11 for acquittal—I have no way of knowing and I'm not asking you to tell me.

I would like to tell you this: While the verdict must be the verdict of each individual Juror, and not just a mere acquisence in the conclusion of your fellow jurors,

yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It would be an unusual thing for all 12 of you to go to the Jury room thinking exactly alike when you go in there. That is one reason we discuss this matter, because some Juror may think of something that someone else has overlooked, and others may think of something that you have overlooked.

It is your duty to decide this case if you can conscientiously do so. You should listen with a disposition to be convinced to each other's arguments. If a larger number are—if the larger number are for conviction or acquittal, a dissenting Juror should consider whether his or her doubt is a reasonable one, which made no impression on the minds of so many other Jurors, equally honest and equally intelligent with himself.

The Jury, of course, should not go contrary to their convictions, but they should properly give heed to the opinions of their fellow jurors, and by reasonable concessions reach a conclusion, which, although not originally entertained by them, nevertheless may be one to which all can scrupulously adhere.

In other words, the minority should listen to the views of the majority with a disposition to be convinced. However, no one is expected to sacrifice their honest convictions solely for the sake of reaching an agreement.

I did want to tell you that.

Now, I will ask you to go back to the Jury Room and continue your deliberations.

THEREUPON, the Jury re-retired, and later returned at 4:25 P.M., at which time the following transpired:

THE COURT: One of the officers tells me you want to ask a question.

FOREMAN: It seems like we're not going to reach a verdict.

THE COURT: Don't tell me how you stand with reference to acquittal or conviction, but how do you stand—is the officer's report of 11 to 1 correct?

FOREMAN: Well, on one condition. There are two things there——

THE COURT: Let me ask you this—it is your duty to reach a verdict if you can possibly do so—you 12 people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones.

Do any of you—let me ask you this—have you reached a verdict—you know the Court told you you could report one of three verdicts—one, guilty of robbery; one, guilty of petit larcency, or one, not guilty.

Have you reached a verdict with reference to the robbery?

FOREMAN: Yes, sir.

THE COURT: How do you find on that?

FOREMAN: Guilty.

THE COURT: You mean the majority?

FOREMAN: Yes.

THE COURT: I don't know of anything else to tell you. How long have you all been deliberating—2-1/2 hours—3 hours?

COURT REPORTER: They retired at 1:45.

JUROR: Could we ask the defendants one question, under oath?

THE COURT: No, I am afraid you can't now, as much as I'd like to let you do it. As a matter of fact it is not permissible.

I can't talk to you about the facts, but on any question of law I can talk to you.

I don't know whether your question is on a question of law or a question of facts. If it's a question of law, I can talk to you. With reference to what happened—what the facts are, I am not permitted to talk to you about it; that's your decision, but if it's some technical question about the law, then I can talk to you about it.

FOREMAN: It's a question of what happened.

THE COURT: Ask your question and if I can answer it I will. I can't talk to you about the facts—what happened.

(Discussion among jurors)

THE COURT: What was your question?

JUROR: Nothing, that's all.

THE COURT: Do any of you have any questions?

JURY: No.

THE COURT: Go back to the Jury room and see if you can make any progress.

As I told you, it is your duty to decide this case, if you can do so.

THEREUPON, the Jury re-retired at 4:30 o'clock, P.M. and returned into the Court Room at 4:35 o'clock, P.M. and the following transpired:

THE COURT: Have you reached a verdict?

FOREMAN: We have.

THE COURT: What is your verdict?

FOREMAN: We find the three defendants guilty.

THE COURT: You find the three defendants guilty of what?

FOREMAN: Robbery.

THE COURT: What punishment do you fix?

FOREMAN: Five years.

THE COURT: You find all three defendants guilty of Robbery, and fix their punishment at 5 years in the State Penitentiary?

FOREMAN: Yes.

THE COURT: That is your verdict?

JURY: Yes.

THE COURT: So say you all?

JURY: Yes.

THEREUPON, THE JURY WAS EXCUSED."

Appendix C

Error is assigned upon the use of the so-called "Allen" Charge (*Allen v. U. S.*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528); upon the fact that the supplemental charges were not in writing, and upon the alleged coercion exercised by the Court upon the lone dissenting juror by giving the charges.

The giving of the first supplemental charge, sometimes known as the "Allen" or "dynamite" charge, was expressly approved by our Supreme Court in the case of *Simmons v. State*, 198 Tenn. 587, 281 S.W.2d 487, citing also the earlier Tennessee case of *High v. Lenow*, 195 Tenn. 158, 258 S.W.2d 742. Unquestionably, its use was not error.

During the second dialogue with the jury, the judge said:

"——it is your duty to reach a verdict if you can possibly do so. You twelve people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones. * * * * I don't know of anything else to tell you. * * * * Go back to the jury room and see if you can make any progress. As I told you, it is your duty to decide this case, if you can do so."

In *Frady v. State*, 67 Tenn. 349, we find the following:

"The judge of the criminal court, two days after he had given his charge, upon their return into court and announcing that they could not agree, stated to the jury that 'some twelve men had to settle the matter; that a verdict should be rendered if you could do so without violating their conscience, and under the oath they had taken.' After these remarks were made, the jury retired, and in a few minutes returned with a verdict of guilty, etc."

"It is urged that it was error in the judge thus to address the jury, because it was improper influence exerted upon them to produce an agreement, and because, also, in violation, of the statute requiring 'every word of the judge's charge' in a felony case to be reduced to writing."

"We do not think there is anything in the objection made. No improper motives for an agreement were appealed to. The jury were simply told that it was desirable that they should agree, if they could conscientiously do so. ***These remarks were not a part of the instructions of the court to the jury***. They were not designed to instruct them in any question of law arising in the case, and were not a part of the charge. The purpose of the statute was to require the judge to give written instructions upon all legal questions arising in the case, but not to prevent that necessary and indispensible intercourse between judge and jury in the progress of the trial being had verbally which relates to their conduct or action in other particulars than in regard to the rules of law by which they should be governed in rendering their verdict."

"All that relates to the principles of law by which they shall be governed in arriving at and rendering their verdict—the instructions of the court to the jury—should be in writing. All other proper communications by the court to them may be verbally made."

"***It is the instructions of the court upon the law of the case that constitutes his charge.***" (Emphasis supplied.)

Under the authority of *Frady v. State*, *supra*, we hold that this second dialogue with the jury was not coercive.

And it would appear that both supplemental instructions would fall into that category said in *Frady* not to be required to be in writing. Certainly the second falls under the *Frady* rule. If the first, more formal, supplemental charge (the "Allen" charge) should have been in writing, under T.C.A. §40-2516, such technical error can hardly be said to have been prejudicial, since it certainly did not bring about a verdict; hence, we may apply the harmless error doctrine, as was done in *Munson v. State*, 141 Tenn. 522, 213 S.W.2d 916, involving a technically improper oral charge in a felony case. And in *Black v. State*, 201 Tenn. 15, 296 S.W.2d 833, our Supreme Court recognized that T.C.A. §27-117, our "harmless error" statute, was applicable in a proper case to a technical violation of T.C.A. §40-2516. See also *Gamble v. State*, 215 Tenn. 26, 383 S.W.2d 48.

We affirm the judgment of the trial court.

/s/ William S. Russell,
William S. Russell, Judge

CONCUR:

/s/ Mark A. Walker
Mark A. Walker, Presiding Judge

/s/ Charles Galbreath
Charles Galbreath, Judge

APPENDIX D

The instructions which provided the basis for the Court of Appeals' decision are found in the following part of the trial transcript:

"Thereupon, the jury retired at 1:45 O'Clock, P.M. to deliberate, and at 3:50 O'Clock, P.M. the Court recalled the Jury, and the following transpired:

THE COURT: A few minutes ago I sent one of the officers to check with you to see if you were making any progress, and I believe he came back with the report that you stood 11 to one. I don't know whether that's 11 for conviction, or 11 for acquittal—I have no way of knowing and I'm not asking you to tell me.

I would like to tell you this: While the verdict must be the verdict of each individual Juror, and not just a mere acquiesence in the conclusion of your fellow jurors, yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It would be an unusual thing for all 12 of you to go to the Jury room thinking exactly alike when you go in there. That is one reason we discuss this matter, because some Juror may think of something that someone else has overlooked, and others may think of something that you have overlooked.

It is your duty to decide this case if you can conscientiously do so. You should listen with a disposition to be convinced to each other's arguments. If a larger number are—if the larger number are for conviction

or acquittal, a dissenting Juror should consider whether his or her doubt is a reasonable one, which made no impression on the minds of so many other Jurors, equally honest and equally intelligent with himself.

The Jury, of course, should not go contrary to their convictions, but they should properly give heed to the opinions of their fellow jurors, and by reasonable concession reach a conclusion, which, although not originally entertained by them, nevertheless may be one to which all can scrupulously adhere.

In other words, the minority should listen to the veiws of the majority with a disposition to be convinced. However, no one is expected to sacrifice their honest convictions solely for the sake of reaching an agreement.

I did want to tell you that.

Now, I will ask you to go back to the Jury Room and continue your deliberations.

THEREUPON, the Jury re-retired, and later returned at 4:25 P.M., at which time the following transpired:

THE COURT: One of the officers tells me you want to ask a question.

FOREMAN: It seems like we're not going to reach a verdict.

THE COURT: Don't tell me how you stand with reference to acquittal or conviction, but how do you stand—is the officer's report 11 to 1 correct?

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FOREMAN: It's a question of what happened.

THE COURT: Ask your question and if I can answer it I will. I can't talk to you about the facts —what happened.

(Discussion among jurors)

THE COURT: What was your question?

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